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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 481

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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November 9, 1943.

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PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Safeway Stores, Incorporated, respectfully submits to this Honorable Court the following:

A.

STATEMENT OF MATTER INVOLVED.

Petitioner filed a protest against each of three different regulations issued by the respondent Price Administrator. (Record, pages 2, 10, 17.)

Under Section 203 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 923 (a), 56 Stat. 31, the Administrator is directed to "grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith", and is required to do so "within a reasonable time" after the filing of the protest, but "in no event more than thirty days after such filing or ninety days after the issuance of the regulation" protested, "whichever occurs later".

The statutory period within which the Administrator was *required* to take one of the four above-mentioned actions expired on August 12, 1943, with respect to the first two protests, and on August 23rd with respect to the third protest. (R. pp. 3, 10, 18.)

In none of these cases did the Administrator, within the periods provided, take any of the actions required of him by the statute. Petitioner contends that the failure and refusal of the Administrator to act in accordance with law were arbitrary and capricious and constituted, in fact and in contemplation of law, a denial of the protests.

In the first case petitioner filed a complaint (R. 1) in the United States Emergency Court of Appeals on August 27, 1943, pursuant to Section 204 (a) of the Act, 50 U. S. C. A. App. § 924 (a), 56 Stat. 31, and it was assigned Docket No. 80. In the second case a complaint (Docket No. 82, R. 8), was filed on September 4, 1943, and in the third case a complaint (Docket No. 84, R. 15), was filed on September 9, 1943. Each complaint was filed within the 30-day statutory period provided therefor.

The Price Administrator moved to dismiss each complaint (R. 6, 14, 21) for lack of jurisdiction on the ground that, while admittedly he had not taken any of the required actions within the statutory periods specified, a complaint

will not lie until he has taken positive action denying the protests in whole or in part (R. 24). The Emergency Court granted the motions and dismissed the complaints. (R. 22.)

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 924 (d), 56 Stat. 31. The Emergency Court dismissed the complaints herein by judgment entered on October 12, 1943. (R. 22.)

C.

QUESTION PRESENTED.

The sole question presented is whether the failure and refusal of the Price Administrator to take, within the statutory limitation period provided, any one of the specified mandatory steps which he is directed to take by Section 203 (a) of the Emergency Price Control Act, constitute a denial of the protest involved within the contemplation of Section 204 (a) so as to afford the protestant the right to file a complaint in the Emergency Court of Appeals. (The Emergency Court held (R. 26) that "the protest must have been actually denied by an overt act of the Administrator.")

D.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. *The Emergency Court of Appeals has decided a substantial question of federal law of general importance which has not been, but should be, settled by this Court.* There is here presented to this Court for the first time a question involving the mandatory procedural provisions of Section

203 (a) and the review provisions of Section 204 (a) of the Emergency Price Control Act of 1942. The decision of the Emergency Court sanctions a wilful disregard by the Administrator of the mandatory provisions of the Act and thus makes a mockery of the review provisions. Speedy determination of protests by the Administrator and prompt judicial review are required by the Act. The Emergency Court is given exclusive jurisdiction, subject only to review by this Court. Interim relief is specifically withheld by Sections 204 (c) and (d), although a protestant's business may be in grave jeopardy under the regulation involved.

2. *The Emergency Court of Appeals has construed the Emergency Price Control Act of 1942 in such a way as to make its operation violative of the Fifth Amendment to the Constitution of the United States.* The decision of the Emergency Court deprives petitioner of its property without due process of law. Even though the regulation be highly confiscatory it may not be enjoined or its operation suspended by any court; it may only be set aside upon final consideration by the Emergency Court or, upon review, by this Court. Thus, by dilatory tactics (such as the Administrator admits he employed in this case), contrary to the express mandate of the Act but sanctioned by the Emergency Court, the Administrator may cause immeasurable and irreparable loss to a protestant, even to such an extent as to put him out of business. And, regardless of the loss incurred before relief is obtained, there is no provision whereby a protestant may be made whole. Such deprivation of property without due process of law is in violation of the Fifth Amendment to the Constitution of the United States.

3. *The Emergency Court of Appeals has failed to give proper effect to applicable decisions of this Court relating to statutory construction.* The decision herein construes

the Emergency Price Control Act in such a way as to lead to absurd results and seriously to impair its effectiveness by eliminating, or unduly restricting and hampering, the review provisions. Such a construction is contrary to the rules of statutory construction enunciated by this Court and may and should be avoided by considering the purpose of the Act to provide *speedy* judicial review.

WHEREFORE, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, and that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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November 9, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

SAFEWAY STORES, INCORPORATED,
Petitioner,

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CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW.

The opinion (R. 23) of the United States Emergency Court of Appeals is not yet reported, but petitioner is advised that it will appear in 137 F. (2d).

II.

JURISDICTION.

The judgment of the Emergency Court was entered on October 12, 1943. (R. 22.) The jurisdiction of this Court

is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. §924 (d), 56 Stat. 31.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" of the Petition (pp. 1-3 herein), and it is incorporated here by reference.

IV.

SPECIFICATION OF ERRORS.

1. The Emergency Court erred in entering a judgment granting the motions to dismiss the complaints.

2. The Emergency Court erred in holding that the wilful failure of the Price Administrator to take any of the specified actions required of him within the periods of time provided by the statute did not constitute such a denial of the protests as afforded the protestant the right to file complaints.

3. The Emergency Court erred in holding that a protest must be actually denied by an *overt act* of the Administrator in order to afford the protestant the right to file a complaint.

4. The Emergency Court erred in holding that where, as in this case, the Administrator unlawfully fails to act upon a protest within the statutory period provided, the protestant has a remedy by way of an order in the nature of a writ of mandamus directing the Administrator to take action.

V.

QUESTION PRESENTED.

The sole question presented is whether the failure and refusal of the Price Administrator to take, within the statu-

tory limitation period provided any one of the steps which he is directed to take by Section 203 (a) of the Emergency Price Control Act, constitute a denial of the protest within the contemplation of Section 204 (a) so as to afford the protestant the right to file a complaint in the Emergency Court of Appeals.

VI.

STATUTORY PROVISIONS INVOLVED.

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. A. App. § 901. The provisions thereof, insofar as pertinent to the question here presented, follow:

> "Sec. 203. (a) . . . *Within a reasonable time* after the filing of any protest under this subsection, *but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order* . . . in respect of which the protest is filed, whichever occurs later, the Administrator shall either *grant or deny such protest in whole or in part, notice such protest for hearing,* or *provide an opportunity to present further evidence in connection therewith.* . . ." (Emphases supplied.)

> "Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, *within thirty days after such denial, file a complaint with the Emergency Court of Appeals,* . . . *Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation,* order, or price schedule, in whole or in part, to *dismiss the complaint,* or *to remand the proceeding:* . . ." (Emphases supplied.)

> "(c) . . . The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the *court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining,* in whole

or in part, the effectiveness of any regulation . . . The court shall exercise its powers and prescribe rules governing its procedure in such manner as to *expedite the determination of cases* of which it has jurisdiction under this Act. . . ." (Emphases supplied.)

"(d) *Within thirty days* after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a *petition for a writ of certiorari may be filed in the Supreme Court of the United States, . . . The Supreme Court shall advance on the docket and expedite the disposition of all causes* filed therein pursuant to this subsection. *The Emergency Court of Appeals, and the Supreme Court* upon review of judgments and orders of the Emergency Court of Appeals, *shall have exclusive jurisdiction* to determine the validity of any regulation. . . . *Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation,* order, or price schedule, *or to stay, restrain, enjoin, or set aside,* in whole or in part, any provision of this Act authorizing the issuance of such regulations . . ." (Emphases supplied.)

VII.

SUMMARY OF ARGUMENT.

Point 1. There has been judicial recognition of the broad general principle that, as here applied, the failure of the Administrator, within the statutory limitation period, to take any of the required actions cannot be used to thwart judicial review; and that such attitude, continued beyond the statutory period provided for positive action, constitutes, in fact and in contemplation of law, a denial of the protest involved and gives rise to the right of appeal. The contrary contention, asserted by the Administrator and accepted by the Emergency Court, does not give effect to the clear intent of Congress that a protestant shall have

the advantage of prompt administrative action and speedy judicial review.

Point 2. The narrow construction placed upon the Act by the Emergency Court in requiring an overt act of denial and in not requiring the Administrator to act within the time limit set by the statute not only nullifies the intent of Congress to provide prompt determination by the Administrator but it also nullifies the intent to provide speedy adjudication by delaying indefinitely the time when such adjudication may become possible. Such construction, contrary to the rule relating to statutory construction often enunciated by this Court, will seriously impair the effectiveness of the Act and lead to absurd consequences, while ignoring a reasonable interpretation which would be entirely consistent with the legislative purpose, namely, that the Administrator's failure to act within the statutory limitation period provided constitutes such a denial as will support a complaint in the Emergency Court.

Point 3. The decision of the Emergency Court indefinitely extends the reasonable limitations imposed by Congress upon the required actions of the Administrator and thus postpones, or may even preclude, the operation of the due process machinery of the Act and, in the case of an unlawfully confiscatory regulation, results in a deprivation of property in violation of the Fifth Amendment to the Constitution. (Interim relief is expressly forbidden, and there is no provision whereby a person may recover for losses sustained under a regulation which is finally held to be unlawful.)

Point 4. If the Emergency Court should, as it erroneously contends is its prerogative, assume jurisdiction for the purpose of issuing a mandatory order requiring the Administrator to take action upon a pending protest, the only action that could properly be considered in aid of, or

as removing an obstacle to, the jurisdiction of the court would be one *denying* the protest. No other action could possibly lay the foundation for a complaint upon the filing of which the court would acquire jurisdiction of the subject matter. But no such action could properly be ordered because it would interfere with the exercise of the Administrator's discretion and be beyond the realm of mandamus. And even if the court were to issue such a mandatory order, other dilatory tactics are available to the Administrator which would only serve to accentuate the inadequacy of the remedy suggested by the court.

VIII.

ARGUMENT.

Point 1. The failure of the Administrator to act upon petitioner's protests within the statutory limitation period constituted a denial of the protests.

The Administrator came before the Emergency Court and frankly admitted his failure to act upon petitioner's protests within the applicable statutory limitation periods and his violation of the Act creating his office and prescribing his duties and the manner and method of carrying them out, but he contended that the court could not entertain petitioner's complaints because he had not, by a positive act, denied petitioner's protests in whole or in part.[1] The court adopted the contention.

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[1] In his brief in support of his motion to dismiss the complaint in Docket No. 80 the Administrator contended that "the fact that formal action in accordance with section 203 (a) of the Act was not taken until *several days* after the expiration of the statutory period is not sufficient to outweigh the considerations underlying the entire statutory method of protest and judicial review." In other words, the Administrator contended below that any delay attribu-

Petitioner concedes that there may be no case on all fours with that at bar. However, it does contend that there has been judicial recognition of the broad general principle that, as here applied, the failure of the Administrator, within the statutory limitation period, to take any of the required actions cannot be used to thwart judicial review; and that such attitude, continued beyond the statutory period provided for positive action, constitutes, in fact and in contemplation of law, a denial of the protest involved and gives rise to the right of appeal. The contrary contention, asserted by the Administrator and accepted by the Emergency Court, does not give effect to the clear intent of Congress that a protestant shall have the advantage of prompt administrative action and speedy judicial review.

In the case of *Taylor v. Mason*, 9 Wheat. 325, 344, this Court, through Mr. Chief Justice Marshall, stated that "the words 'refusing to comply' may, in general, have the same operation in law as the words 'failing to comply' would have". There the failure to comply referred to a condition in a will, but it voiced the general principle that inaction may amount to the same thing as an overt refusal to act or, as applied to the case at bar, that failure to grant amounts to the same thing as denial—refusal to grant. The same reasoning would apply to an order of the Administrator granting a protest in part but not specifically denying the remainder. Certainly the part not specifically granted should sensibly be held to have been denied regardless of

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table to his policy must be considered paramount to and substituted for the time limitation imposed by Congress. (Actually, it was *25 days* (see footnote, R. 24) before the Administrator issued an "Order to Show Cause" why the relief requested in the protest had not been granted by an amendment to the regulation involved. This was 10 days *after* the complaint was filed in the Emergency Court.—The amendment did not afford complete relief.)

the absence of positive or overt action to that effect. Otherwise, "denial" would hinge upon the use of particular words by the Administrator at the time he takes action.

This general principle of denial or refusal by inaction was followed in *Ginnochio v. Hydraulic Press Brick Co.*, 266 Fed. 564, 569, citing the decision of this Court in the *Taylor* case, supra, although the situation was entirely dissimilar, involving the Ohio Workmen's Compensation Act. And in *Commercial Casualty Insurance Co. v. Hilton* (Tex. Civ. App.), 55 S. W. (2d) 120,[2] the refusal of a State Industrial Accident Board to act in such a way as clearly to afford a statutory right of judicial review was held to constitute such a denial as to support an appeal to the courts.

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[2] An appeal was taken from the refusal of the Industrial Accident Board to set aside a compromise settlement of a compensation claim on the ground that it was obtained by fraud or mistake. The Board also refused to set for hearing an application to reopen the case and set aside the order of compromise. The lower court set aside the compromise for fraud and gave judgment for compensation and expenses. The appellant contended, inter alia, that the court acquired no jurisdiction to adjudicate the claim for compensation and expenses but only the question of mistake or fraud, and that the Board's refusal to hear and determine the matter on the merits constituted no *appealable* award thereon. The appellate court stated (p. 122):

> ". . . It is true that the jurisdiction of courts under the Workmen's Compensation Act attaches only by appeal from a *final award* or decision of the Industrial Accident Board, either awarding or refusing a claim for compensation or other relief authorized by the Act. . .
>
> ". . . if the Board, in the exercise of its administrative and quasi-judicial functions under the Act, had the power or authority to review its previous order approving the compromise settlement agreement, and to set it aside or change or revoke it upon a showing

A further recognition of the negative effect of failure to act occurred in *Dobbie v. United States* (1927), 19 F. (2d) 656, which arose under the World War Veterans' Act and was based upon the refusal of the Director to take action upon a claim. The court held (p. 657) that—

> ". . . it is the height of unreason to say that the director can unreasonably delay action on a claim and thus oust the courts of jurisdiction until he is ready to confer it on them. *Such a contention finds no support either in morals, common sense or law.* . . ."[3] (Emphasis supplied.)

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that it had been procured by mistake or fraud, we think it manifest that the . . . *order of the Board, refusing to set aside the settlement agreement . . . and refusing to consider appellee's claim . . . constituted a denial of the claim for compensation, giving the courts jurisdiction on this appeal.* . . . Whatever the reason . . . , *the refusal to act effectively closed the door of relief to him; and was a denial of his pending claim for compensation.* . . ." (Emphases supplied.)

[3] See also *Holmes County, Miss. v. Burton Const. Co., et al.*, 267 Fed. 769, wherein it was held (pp. 771-772) that—

> ". . . *the failure to allow, after a reasonable time, is equivalent, for the purposes of suit on a claim, to an actual denial.* The purpose of the presentation is to give the county an opportunity to examine and consider the claim on its merits before being subjected to a suit. *It is not the purpose of the statute, nor can it be given the effect, to permit the board to defeat a claim by nonaction. Such a construction would amount to lodging with the board the power to deny suitors access to the courts.* . . ." (Emphases supplied.)

And *People ex rel. Village of Hinsdale v. Bd. of Sup'rs. of DuPage County*, 309 Ill. App. 609, 617, where the refusal of the County Board "to formally pass upon the request of the Village" was held to be "in effect a denial" thereof.

The language of the Veteran's Act upon which the *Dobbie* case turned was changed by the Act of July 3, 1930,[4] but the principle enunciated in that case remains undisturbed. Furthermore, in Veterans' cases the Administrator of Veterans' Affairs is not required to take action within any specified time, and suit may be brought within six years from the time the claim accrues. That is vastly different from the limitation of time imposed upon the Price Administrator under the Emergency Price Control Act, and from the 30 days allowed for appeal to the Emergency Court. If a protestant should assume that that court has jurisdiction to issue a mandatory order to compel action by the Price Administrator and file a motion to that end, by the time the motion was denied as being beyond the jurisdiction of the court the 30-day appeal period would doubtlessly have expired or be so far gone as to be of no practical value to the protestant.

By failing to grant a protest, the Administrator as effectively withholds relief from a protestant as though he has formally denied the protest. In fact, his inaction is capable of more far-reaching adverse effect because, under the Administrator's own theory (now adopted by the Emergency Court), a protestant has no right of judicial review until positive action is taken. For all a protestant knows, that may never occur. Certainly, if the Administrator may with impunity disregard the statutory mandate for a week he may do so for a month, or for a year, or for all time. Such disregard of the specific procedural requirements of Section 203 (a) of the Act makes a mockery of the right of review granted by Section 204 (a).

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[4] 38 U. S. C. A. §445. See *United States v. Bell*, 80 F. (2d) 516.

Point 2. The narrow interpretation given the Act by the Emergency Court is contrary to the legislative purpose and the decisions of this Court relating to statutory construction.

The Congressional intent to provide speedy action by the Administrator on protests, speedy determination of complaints filed with the Emergency Court, and speedy disposition of cases reviewed by this Court is obvious from the language of the statute.

Section 203 (a) provides that—

> ". . . *Within a reasonable time* after the filing of any protest under this subsection, *but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order* . . . in respect of which the protest is filed, whichever occurs later, *the Administrator shall* either *grant or deny such protest in whole or in part, notice such protest for hearing,* or *provide an opportunity to present further evidence in connection therewith.* . . ." (Emphases supplied.)

Section 204 (a) provides a period of 30 days within which a complaint may be filed with the Emergency Court after a denial of a protest, and Section 204 (c) admonishes the court to—

> ". . . expedite the determination of cases of which it has jurisdiction under this Act."

Only 30 days (instead of the usual three months) after the entry of a judgment by the Emergency Court are allowed by Section 204 (d) for filing a petition for a writ of certiorari in this Court. It is then provided that this Court—

> ". . . shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. . . ."

In spite of such clearly expressed intent to expedite consideration of cases from their inception in the Office of Price Administration on through their adjudication in the Emergency Court and before this Court, the Emergency Court, in effect, states that the Administrator is not bound by the mandate of the statute directing him to act within a specified time. This not only nullifies the expressed purpose of Congress to provide prompt determination by the Administrator but it likewise nullifies the expressed requirement for speedy adjudication in such a way as to substitute the will of the Administrator for the expressed will of Congress.

The Emergency Court, in requiring an overt act of denial, with its aforementioned consequences, has created a result contrary to the rule enunciated by this Court that "all laws are to be given a sensible construction," and that "a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz,* 271 U. S. 354, 357. See also *United States v. Ryan,* 284 U. S. 167, 175, and *United States v. American Trucking Association,* 310 U. S. 534, 543. Indeed, this Court has even stated that a statute will not be given a construction by which its "effectiveness" will be "seriously impaired", where a different construction is possible. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 392.

It is hardly necessary to point out that the interpretation given the Act by the Emergency Court will seriously impair its effectiveness and lead to absurd consequences, and that a reasonable construction, which would be entirely consistent with the legislative purpose, would be to apply the principle urged by the petitioner that the Administrator's failure to act within the statutory limitation period

provided constitutes such a denial as will support a complaint in the Emergency Court.[5]

Point 3. The decision of the Emergency Court makes the operation of the Act violative of the Fifth Amendment to the Constitution.

Petitioner realizes that the purpose of the Emergency Price Control Act may not be achieved without imposing hardship on many persons—hardship which may often border on actual confiscation of property before the due process machinery of the Act can be set in motion. It is not contended that such a situation in the furtherance of the national defense and security is in violation of the Constitution of the United States. However, it is well settled that the existence of a state of war does not suspend or change the Constitutional guaranties. *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88. And when the provisions of the Act which are intended to afford due process are construed in such a way as to extend the confiscatory administrative period beyond the reasonable limitations imposed by Congress, petitioner contends that there is a failure of due process and a deprivation of property in violation of the Fifth Amendment to the Constitution.

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[5] A further indication of the legislative intent to provide speedy determination of cases appears in a bill (S. 238, 78th Cong., 1st Sess.) now pending in Congress and footnoted (R. 27) in the opinion of the Emergency Court. It proposes to amend Section 203 (a) of the Act by compelling the Administrator, within 60 days (instead of the 90 now provided) after the filing of a protest, to grant or deny it in whole or in part. It also clarifies Section 204 (a) by specifically providing for a complaint based upon the "failure of the Administrator to reach a decision on said protest within the period designated." The bill is now before a subcommittee of the Senate Committee on the Judiciary.

Even though the regulation involved be highly confiscatory it may not be enjoined or its operation suspended by any court; it may only be set aside upon final determination by the Emergency Court or, upon review, by this Court. In such a case the employment of dilatory tactics by the Administrator (as was admittedly done here) may cause immeasurable, or even ruinous, loss to a protestant. An ultimate judicial determination in a protestant's favor would be of little practical value because no method is provided whereby a person unlawfully subjected to loss may be made whole. Such deprivation of property is both contrary to the expressed legislative purpose to provide speedy justice and violative of the due process clause of the Fifth Amendment to the Constitution.

Point 4. The decision of the Emergency Court, contrary to the intent of Congress, leaves petitioner without an adequate remedy.

The Emergency Court, in an apparent effort to support its decision that a protestant has no right to file a complaint regardless of the failure and refusal of the Administrator to obey the mandatory provisions of Section 204 (a), states (R. 27):

> "It does not follow, however, that a protestant is wholly without remedy in case the Price Administrator improperly delays action upon his protest. . . . If the Administrator should unreasonably delay final action it would seem clear that *this court, upon a proper showing, may* under the authority of Section 266 of the Judicial Code (28 U. S. C. A. § 377) *in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest. . . .*" (Emphases supplied.)

Petitioner is aware of the well-established rule recently repeated by this Court in *Roche v. Evaporated Milk Asso-*

ciation, 319 U. S. (Adv. Op.) 21, 25, to the effect that the authority of an appellate court to issue a writ of mandamus is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." Later appears the observation that "a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal." But an appellate court will not order a lower court to proceed in any certain way, as that would be interfering with its discretion and judgment. See *Ex parte Newman*, 81 U. S. 152, 169.

None of the cases which support this rule involves a federal agency or department whose exercise of certain powers is ordered within a specified period of time. For the most part they involve lower *courts*, which are not required to act within any given time, and whose ultimate action could be made the subject of review by one *or more* parties. Similarly, in the only case (*Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474) cited by the Emergency Court involving mandamus to a federal agency there was no time limit within which action was required to be taken. Indeed, there the Interstate Commerce Commission *had acted*, but in a way to which the petitioner objected, the Commission having dismissed the petition for lack of jurisdiction. This Court held that the Commission did have jurisdiction and ordered a writ of mandamus to issue to compel it to proceed according to law.

In addition to the absence of any limitation period upon the required action, there is another material difference between the cases upholding the aforementioned rule and that at bar. Here the proceeding before the Administrator was

ex parte in nature, there being no party other than petitioner involved. Therefore, petitioner was the *only* one to whom a right of appeal could possibly accrue, and that would occur *only* upon its failure to obtain the desired relief in the proceedings before the Administrator, namely, only in the event of a *denial* of its protest.

Therefore, if the lower court should assume jurisdiction for the purpose of issuing a mandatory order requiring the Administrator to take action, it is perfectly clear that the only action which could properly be considered "in aid" of, or as removing an obstacle to, the jurisdiction of the court would be one *denying the protest* in whole or in part. *No other action could possibly lay the foundation for a complaint upon the filing of which the court would acquire jurisdiction of the subject matter.* But, obviously, as admitted by the Emergency Court (R. 28), no such action would be ordered because it would interfere with the exercise of the Administrator's discretion and be beyond the realm of mandamus.

The jurisdiction of the Price Administrator is not in question, as was that of the Interstate Commerce Commission in the *Humboldt* case, supra, but only the failure and refusal of the Administrator to take any one of the mandatory actions prescribed by law within the time limit specified. In cases arising under the Emergency Price Control Act time is an all-important element, as we have seen by (1) the time limitation placed upon the Administrator, (2) the 30-day period allowed for filing a complaint in the Emergency Court, with the direction that that court shall "expedite the determination" of cases, and (3) the 30 days (instead of the usual three months) provided for filing a petition for a writ of certiorari in this Court, with the requirement that this Court "shall advance on the docket and expedite the disposition" of the cause.

The Congress even indicated that the time limitation upon the prescribed actions of the Administrator is beyond that which might ordinarily be termed "reasonable". The Act states that a "reasonable" time for action is *within* ("in no event *more* than") the limitation period provided by Section 203 (a). Any delay beyond such period would obviously be unreasonable within the meaning of the statute; indeed, it would seem that the *maximum* limitation period, while available in an emergency (where the Administrator is unable to make up his mind "within a reasonable time"), should be construed as *un*reasonable. But the Emergency Court would apparently substitute a new and indefinite period of delay in which the Administrator might indulge with impunity and, of course, permit the hardship of the regulation to continue unabated and unabatable.

Unless the Administrator is forced to act *within the time limitation set by Congress,* a protestant is left to the mercy of the whims of the Office of Price Administration. There is no relief except through the Emergency Court.[6] Regardless of the hardship being occasioned by the regulation protested, and of the fact that it may be clearly arbitrary and capricious and ultimately set aside by the Emergency Court or by this Court on review, the Act (Sections 204 (c) and (d)) specifically withholds any sort of interim relief by way of injunction or otherwise. Nor does the Act afford any

[6] The Administrator, on the other hand, may cause criminal or civil proceedings to be instituted against a person in any district court within whose jurisdiction the alleged violation occurred and, in the case of a civil proceeding, in the district where the defendant resides or transacts business. (Section 205 (c).) But such person may only question the act of the Administrator in a protest proceeding in the latter's office and then, in case of a "denial", in the Emergency Court, whose decision is subject to review by this Court. (Sections 203 (a), 204 (a) and (d).)

means whereby a protestant may recover losses incurred through the imposition of an unlawful regulation. His only hope is to shorten the period of his loss by obtaining reasonably prompt administrative relief or, failing in that or in persuading the Administrator to take any one of the required actions within the statutory limitation period, by obtaining relief through judicial review at the earliest possible moment.

Therefore, unless the Administrator is held to strict compliance with the mandate of the statute, a protestant, in accordance with the ruling of the Emergency Court, must await the pleasure of the Administrator and his numerous assistants, eight of whom (R. 23-24) joined in the successful effort to have the lower court sanction the inaction which gave rise to the complaints here involved. True, the Emergency Court did indicate that the Administrator might be made the object of an order in the nature of a writ of mandamus if he should "unreasonably" delay action upon a protest, but such authority is questioned under the decisions of this Court and in view of the manifest intent of Congress that there should be *speedy* determination and review.

If a protestant should make that which the Emergency Court would consider a "proper showing" and issue some order in the nature of a writ of mandamus directing the Administrator to act upon a pending protest he could, for example, merely notice the protest for hearing, as he was originally requested to do in this case,[7] and then continually

---

[7] In each case petitioner requested oral hearing. (R. 2, 10, 17.) However, as already indicated, no protest here involved was noticed for hearing. In fact on September 8, 1943, the Administrator specifically *denied* the requests for oral hearings. (R. 24, footnote.) This was *after* the first two complaints were filed, and the day before the third was filed.

put off the day of hearing. If the lower court should then see fit to issue another mandatory order, the Administrator, after further delays, could "provide an opportunity to present further evidence", and then, after the lapse of additional time, grant the protest in part. If this were considered an "overt act" of denial as to the balance of the protest the protestant could, if he were still in business and able to proceed, file a complaint in the Emergency Court.

Petitioner insists that the alternative provided by the decision of the Emergency Court is certainly not an adequate remedy if, indeed, it be a remedy at all.

IX.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that the procedural and review provisions of the Emergency Price Control Act may be given the effect intended by Congress and required by the Constitution and the decisions of this Court; and that to such an end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

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November 9, 1943.

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562175—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 481

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 23–28) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered October 12, 1943 (R. 22). The petition for a writ of certiorari was filed November 9, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23 (herein sometimes termed "the Act"),

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether, on the assumption that the Price Administrator has not, within the period specified in Section 203 (a) of the Act, granted or denied a protest, noticed it for hearing, or provided the protestant an opportunity to present further evidence, there has been "denial" of the protest within the meaning of Sections 203 (a) and 204 (a) of the Act so as to authorize review in the United States Emergency Court of Appeals of the validity of a maximum price regulation at the instance of the protestant.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, c. 578, 56 Stat. 765, appear in the Appendix, *infra,* pp. 14–19.

STATEMENT

On August 27, September 4 and September 9, 1943, petitioner filed complaints with the United States Emergency Court of Appeals asserting the invalidity of maximum price regulations which govern the sale of grocery items at retail (R. 1, 8, 15). Each complaint alleged that petitioner had theretofore filed protests with the Administrator objecting to these maximum price regulations and that the Price Administrator had failed to take

action under Section 203 (a) of the Act within the period specified in that section. The complaints contended that alleged failure on the part of the Administrator to take action on the protests was "arbitrary and capricious and constituted, in fact, a denial" of the protests (R. 3, 10, 18).

The Administrator moved to dismiss these complaints on the ground that a fatal defect to the jurisdiction of the court appeared on the face of each complaint (R. 6, 14, 21). In addition, he annexed to each motion certified copies of orders under Section 203 (a) entered in each protest proceeding. The Administrator did not admit, as the petitioner suggests, that he had failed to act in accordance with the applicable statutory limitation period in each of these cases. On the contrary, he contended that he had fully complied with the statutory period in two of the cases by appropriate orders in the protest proceedings, and that the delay beyond the statutory period in the other case had occurred only because the regulation involved was being radically revised and substantial relief was being granted.[1] Al-

[1] Petitioner omitted from the transcript the copies of the orders issued by the Administrator in these protest proceedings; these orders, however, are briefly summarized in the court's opinion (R. 24n). The protests involved in complaints No. 82 and 84 below had been consolidated with other protests filed by petitioner with the Administrator and in each case the Administrator had incorporated economic data into the record and had afforded petitioner an opportunity to present evidence in rebuttal. The Administrator contended in the court below that such an opportunity to file rebuttal evidence constituted an "opportunity to present

though the court below stated that it could take judicial notice of the Administrator's orders, it dismissed the complaints filed by petitioner on the basis of the allegations appearing on the face of the complaints, holding that the denial of a protest under Sections 203 (a) and 204 (a) of the Act may arise only from a positive act of the Price Administrator and may not be implied from alleged nonaction (R. 23–28).

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further evidence," one of the actions specified by Section 203 (a) of the Act, and that such action was taken in each consolidated proceeding within the period of time specified by the Act. When petitioner filed its complaints in the court below, the time allowed petitioner for supplying such further evidence had not expired, and petitioner had neither filed evidence nor stated that it did not desire to rebut the evidence placed in the record by the Administrator. The period provided for the filing of rebuttal evidence has now expired, and the protest proceeding involved in No. 82 has reached final disposition through the issuance by the Administrator of an order and opinion of denial. Only with respect to the protest involved in Docket No. 80 did the Administrator concede that action upon the protest had been taken after the period of time specified in the Act. The reason for this delay was the fact that an amendment to the maximum price regulation in question revoking the provision against which the protest had been directed was in the process of issuance, and it appeared that no useful purpose would be served by conducting formal protest proceedings pending the issuance of this amendment. After issuance of this admendment, the Administrator by order provided petitioner an opportunity to show the extent, if any, to which the relief demanded by the protest had not been granted. Petitioner declined to accept this opportunity on the ground that the Price Administrator no longer had jurisdiction of the proceedings.

ARGUMENT

1. The correctness of the decision below is demonstrated both by the language and by the structure of the Emergency Price Control Act, which make clear the intention of Congress that judicial review of the validity of maximum price regulations should occur only after appropriate administrative proceedings have culminated in a positive act of denial of a protest by the Price Administrator. Section 203 (a) of the Act requires that within a specified period of time after the filing of a protest the Price Administrator shall either grant or deny the protest in whole or in part, notice the protest for hearing, or provide the protestant an opportunity to present further evidence. In providing that the Price Administrator could satisfy the requirements of the Act with respect to timely action either by noticing the protest for hearing or providing an opportunity to present further evidence, the Act quite clearly laid the framework for formal administrative proceedings upon protests. In large numbers of protest proceedings, including the proceedings here involved, determination of the issues raised by the protest has required the introduction of evidence into the record either by the Price Administrator or by the protestant, or by both. As the decisions of this Court in comparable cases have indicated, it is not lightly to be assumed that the function of this statutory framework for administrative proceedings may be nulli-

fied by premature resort to the courts. *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company,* 204 U. S. 426.

Moreover, the Act clearly contemplates that if the Price Administrator determines not to grant a protest, the protest proceeding shall be terminated by an order of denial. Section 203 (a) of the Act provides that, "In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based * * *." In practice the statement required by Section 203 (a) has taken the form of an opinion accompanying the order of denial. After providing in Section 203 (a) for this statement by the Price Administrator in the event he denies a protest, the Act in Section 204 (a) conditions the right to file a complaint with the Emergency Court of Appeals upon the "denial or partial denial" of a protest. The conclusion is inescapable that the denial of a protest under Section 204 (a) of the Act, which is a condition precedent to review in the Emergency Court of Appeals, must be the overt act of denial, accompanied by statement as required by the preceding section.

Nor do the cases support petitioner's attempt to broaden the jurisdiction of the Emergency Court of Appeals beyond the scope set forth in the Act. Most of the cases cited in petitioner's brief are inapplicable for reasons which clearly

appear from petitioner's statement of their facts. The only decisions cited by petitioner which at all relate to the present problem are those arising under the World War Veterans' Act of 1924. In *Dobbie* v. *United States,* 19 F. (2d) 656 (S. D. Tex. 1927), upon which petitioner relies, action was brought against the United States under a provision of the World War Veterans' Act which provided that court action could be brought "in the event of disagreement" between the claimant and the Veterans' Bureau. The court held that unreasonable delay in acting upon the claim constituted "disagreement" within the meaning of this provision. Thereafter the Veterans' Act was amended to provide: "The term 'disagreement' means a *denial* of the claim. * * *" [Emphasis supplied.] Following this amendment which rendered the applicable language comparable to that of Section 203 (a) and 204 (a) of the Emergency Price Control Act, the result of the *Dobbie* case has been expressly rejected. Thus, in *United States* v. *Bell,* 80 F. (2d) 516 (C. C. A. 4th, 1935), the circuit court of appeals reversed a decision by a district court which had followed the *Dobbie* case, stating (p. 517):

> The act (World War Veterans' Act of 1924, Sec. 19, as amended by Act July 3, 1930, 38 U. S. C. A. Sec. 445) provides that disagreement "means a denial of the claim by the director or someone acting in his name on an appeal to the director," and manifestly mere failure to pass upon the

> claim is not a disagreement within this definition. Until Congress shall amend the act, the only remedy in such case is mandamus in the Supreme Court of the District of Columbia to compel the Director to pass upon the claim and either allow or disallow it.

The same question arose in *Maulis* v. *United States*, 56 F. (2d) 444 (N. D. Ill. 1931). In an action brought under the World War Veterans' Act the court sustained a motion to dismiss the complaint for lack of jurisdiction.[2] The court stated (p. 446):

> The language of the amendatory statute clearly implies that the United States Veterans' Bureau, through its officials, must take some affirmative action in denying a claim before a disagreement can be said to exist. The language of the statute, both the original act and the act as amended in 1930, contemplates affirmative adverse action by the United States Veterans' Bureau before a justiciable question arises. A denial cannot be implied from nonaction.

---

[2] The same result was reached in *Smith* v. *United States*, 56 F. (2d) 636 (S. D. Iowa 1931), and *Anderson* v. *United States*, 5 F. Supp. 269 (E. D. Ky. 1932). In the *Smith* case the court rejected as "not a satisfactory precedent" the decision in *Holmes County, Miss.*, v. *Burton Const. Co.*, 267 Fed. 769 (C. C. A. 5th, 1920) likewise relied upon by petitioner. The court in the *Holmes County* case had held that failure of a board of supervisors to allow a claim against the county constituted refusal to allow the claim under the Mississippi Code, which required such a refusal prior to bringing court action.

Even these decisions under the World War Veterans' Act do not fully reflect the difficulties involved in judicial review of the validity of maximum price regulations prior to completion of the administrative proceedings before the Price Administrator. Under the World War Veterans' Act, after rejection of the claim by the Veterans' Bureau, any further proceedings are instituted in a trial court in which a trial *de novo* is held. In contrast, the Emergency Price Control Act provides for review by the Emergency Court of Appeals on the record developed in the administrative proceedings before the Price Administrator. Thus, Section 204 (a) of the Act provides that "no evidence * * * shall be considered by the court, unless * * * such evidence shall be contained in the transcript" certified by the Price Administrator.[3] In the light of these provisions of the Act, it is hardly conceivable that Congress intended the Emergency Court of Appeals to undertake to review the validity of maximum price regulations prior to completion

[3] Section 204 (a) of the Act further provides that if the court grants an application for the introduction of additional evidence, such evidence shall be presented to the Price Administrator, "except that on request by the Administrator, any such evidence shall be presented directly to the court." This provision seems clearly designed to protect the primary jurisdiction of the Price Administrator to receive, if he so desires, all evidence which may be presented by the petitioner and to make an administrative determination thereon in advance of judicial review.

of the administrative proceedings underlying the complaint in that court.

2. There remains for consideration petitioner's general contention that the decision below deprives protestants of the right to speedy judicial determination of the validity of maximum price regulations. The jurisdiction of the Emergency Court of Appeals to require compliance by the Price Administrator with the requirement of the Act for prompt action was conceded by the Price Administrator before the court below, and was explicitly recognized in the court's opinion. The court stated (R. 27–28):

> If the Administrator should unreasonably delay final action it would seem clear that this court, upon a proper showing, may under the authority of Section 266 of the Judicial Code (28 U. S. C. A. § 377) in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest. Knickerbocker Ins. Co. v. Comstock, 83 U. S. (16 Wall.) 258, 270 (1872); McClellan v. Carland, 217 U. S. 268, 280 (1910); Roche et al. v. Evaporated Milk Assn. et al., 319 U. S. —— (1943). Under such circumstances mandamus will lie where an inferior tribunal or agency refuses to act even though the act required involves the exercise of judgment and discretion. Ex parte Newman, 81 U. S. (14 Wall.) 152, 169 (1871); Int. Com. Com. v. Humbolt Steamship Co., 224

> U. S. 474, 485 (1912). Of course, in such a case the decree of the court would merely require the Administrator to exercise his discretionary power with respect to the protest without any direction as to the manner in which his discretion should be exercised.

Petitioner advances a number of contentions in an effort to discredit the jurisdiction of the Emergency Court of Appeals to require the Administrator to take action in protest proceedings in the event of unreasonable delay. These contentions are without substance. It is argued that "for the most part" the power to issue mandatory orders has been employed with respect to lower courts rather than administrative agencies (Pet. 21). *Interstate Commerce Commisison* v. *Humbolt Steamship Co.*, 224 U. S. 474, to which petitioner refers, demonstrates that the power to issue mandatory orders is applicable in the case of an administrative agency over which a court exercises supervisory reviewing authority. See also *United States* v. *Bell, supra.* Petitioner further contends that since a complaint may be filed with the Emergency Court of Appeals only upon denial of a protest, the only order which that court could issue "in aid" of its jurisdiction would be to require the Price Administrator to deny the protest, and such an order would be beyond the powers of the court since mandamus may not be employed to require exercise of a

discretionary act in a particular manner (Pet. 22). The answer, as was pointed out by the court below, is that the jurisdiction of that court would be adequately protected, without interfering with the discretion vested in the Administrator, if the court should require him either to grant or deny a pending protest without further delay. Cf. *Ex parte Newman,* 14 Wall. 152, 165–166.

There is, therefore, no basis for the petitioner's contention that, under the decision of the court below, a protestant is not afforded adequate safeguards against the possibility of the Administrator's abusing the protest procedure for the purpose of postponing or preventing judicial review of his actions. Indeed, petitioner's interpretation, which protects a protestant only against the Administrator's failure to take some action within the initial statutory period, provides less protection to protestants generally than does the interpretation of the court below. Under the latter interpretation, in which the Administrator has always concurred, the Administrator is subject to mandamus proceedings in the Emergency Court of Appeals in the event that there is unreasonable delay at any stage of a protest proceeding. Respondent submits that this construction of the Act by the court below is more effective in the safeguard of substantial rights than is the construction for which petitioner here contends.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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NOVEMBER 1943.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23 as amended, c. 578, 56 Stat. 765, are as follows:

> SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the

case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the

proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting

aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The

court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the cost and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price sched-

ule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

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IN THE

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OCTOBER TERM, 1943.

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v.

CHESTER BOWLES, Price Administrator, *Respondent*.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The purpose of this reply brief is to correct a deliberate misstatement of fact in the brief filed on behalf of the respondent Administrator in opposition to the Petition herein:

In the Petition the following statement of fact appears (p. 2):

> "The statutory period within which the Administrator was *required* to take one of the four above-mentioned actions expired on August 12, 1943, with respect

to the first two protests, and on August 23rd with respect to the third protest. (R. pp. 3, 10, 18.)

"*In none of these cases did the Administrator, within the periods provided, take any of the actions required of him by the statute. . . .*" (Last emphasis supplied.)

In the opposition brief the following statement is made on behalf of the Administrator (p. 3):

". . . The Administrator did not admit, as the petitioner suggests, that he had failed to act in accordance with the applicable statutory limitation period in each of these cases. On the contrary, he contended that he had *fully complied with the statutory period in two of the cases by appropriate orders in the protest proceedings,* and that the delay beyond the statutory period in the other case had occurred only because the regulation involved was being radically revised and substantial relief was being granted.[1] . . ." (Emphasis supplied.)

In the footnote to which reference is made the following appears (pp. 3-4):

"[1] . . . The protests involved in complaints No. 82 and 84 below had been consolidated with other protests filed by petitioner with the Administrator and in each case *the Administrator had incorporated economic data into the record and had afforded petitioner an opportunity to present evidence in rebuttal.* The Administrator contended in the court below that such an opportunity to file rebuttal evidence constituted an 'opportunity to present further evidence,' one of the actions specified by Section 203 (a) of the Act, and that *such action was taken in each consolidated proceeding within the period of time specified by the Act.* . . . Only with respect to the protest involved in Docket No. 80 did the Administrator concede that action upon the protest had been taken after the period of time specified in the Act. . . ." (Emphases supplied.)

In other words, the petitioner states that the Administrator took none of the required actions within the statutory periods provided therefor, whereas the Administrator contends that in two (Nos. 82 and 84) of the three cases he

took one of the required actions (provided "an opportunity to present further evidence") "*within the period of time specified by the Act.*" This statement on behalf of the Administrator is *absolutely false.*

Under date of August 24, 1943, in connection with the protest involved in Docket No. 82 (which protest had been consolidated with two others by an order issued on August 7, 1943), the Administrator issued an "Order incorporating certain materials into the record and giving protestant opportunity to present rebuttal evidence" in 30 days, which order was accompanied by a "Statement of economic data and other facts officially noticed by the Price Administrator." On September 8, 1943, the Administrator issued another order, this time denying petitioner's request for oral hearing and "providing an opportunity to present further evidence." The Administrator asserted that each of these orders constituted one of the actions required by the statute, namely, to "provide an opportunity to present further evidence", although the order of September 8th was the only one which strictly complied with the statute. Suffice it to say, whether the order of August 24th or the order of September 8th constituted the required statutory action is beside the point because such action, if taken at all, was *required* to be taken on or before *August 12, 1943—not August 24th or September 8th.* (Reference to these dates occurs in a footnote (R. 24) to the decision of the Emergency Court.)

Under date of August 28, 1943, in connection with the protest involved in Docket No. 84 (which protest had been consolidated with three others by an order issued August 7, 1943), the Administrator issued an order denying petitioner's request for oral hearing and providing "an opportunity to present in written form [within 30 days] the further evidence" which the petitioner "would have presented if an oral hearing had been held." On September 3, 1943, the Administrator issued another order, this time incorporating into the record certain material from the Bureau of

Labor Statistics, together with a statement of economic data and other facts officially noticed by him, and providing petitioner an opportunity to present, within 30 days, rebuttal or explanatory evidence. Regardless of whether one or both of these orders constituted the statutory action required to be taken by the Administrator the fact remains that he was *required* to act on or before *August 23, 1943—not August 28th or September 3rd.* (Reference to these dates occurs in a footnote (R. 25) to the decision of the Emergency Court.)

It is thus obvious that, instead of taking action "in each consolidated proceeding *within the period of time specified by the Act*", as the Administrator (Brief, p. 4n) would mislead this Court to believe, *he actually took action after the expiration of the statutory limitation period.*

Respectfully submitted,

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Attorneys for Petitioner.

December 3, 1943.

No. 483

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

- - - - -

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF APPEALS

- - - - -

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

- - - - -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

- - - - -

No. 481

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

- - - - -

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

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This memorandum is submitted in response to the assertion in petitioner's reply brief that there is a "deliberate misstatement of fact" in the brief in opposition to certiorari.

The brief in opposition stated that the Administrator had not, as the petition for certiorari suggested, admitted in the court below that he had failed to act in accordance with the applicable statutory limitation period in each of these cases, but that, on the contrary, his contention was that he had fully complied with the statutory period in two of the cases by appropriate orders in the protest proceedings. This was an accurate statement of the respondent's position in the court below. That position, elaborated in respondent's memoranda filed below, was based upon the propositions that in the case of properly consolidated protest proceedings the statutory time limit should not be computed solely with respect to the first protest, that with respect to several

of the protests filed by the petitioner and included in each of the consolidated proceedings the orders were indisputably within the statutory period, and that therefore the orders were timely with respect to the consolidated proceedings as a whole. Petitioner's calculations, on the other hand, are based on the assumption that the statutory time limit in consolidated proceedings should be determined by the filing of the first protest. Thus there was presented to the court below a legal question as to the proper application of the provisions of Section 203(a) with respect to the period of time allowed for action in protest proceedings--a question which the court found it unnecessary to decide. There has been no disagreement, much less misstatement, as to the facts. There has been, as is evident, sharp disagreement as to the legal significance of those facts.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
Acting General Counsel,

Office of Price Administration.

DECEMBER 1943.